OCBC BANK (MALAYSIA) BHD v. PROLINK MARKETING SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
CHE MOHD RUZIMA GHAZALI JCA
MOHD NAZLAN GHAZALI JCA
[CIVIL APPEAL NOS: B-02(NCvC)(W)-227-02-2021
& B-02(IM)(NCvC)-1580-08-2021]
30 JANUARY 2023

Abstract – *In a claim for damages, it is not sufficient for the claimant to merely state the amount of damages that he is claiming. He must prove the damages that he had suffered to the satisfaction of the court. The claimant must adduce sufficient evidence to enable the court to make a fair and reasonable assumption of loss. This is also in accordance with the requirement of s. 103 of the Evidence Act 1950 and the principle that he who alleges must prove.*

BANKING: *Banking facility – Redemption – Damages – Claim for – Bank customer allegedly suffered losses and damages – Allegation of bank's inaction towards request for redemption – Land charge over five lands discharged – Whether bank breached contractual obligations against customer – Whether bank negligent in not allowing redemption – Whether bank breached duty of care towards customer – Whether bank had right to refuse redemption – Whether damages proven and substantiated – Whether there was lack of judicial appreciation by trial judge*

There were two appeals against the decisions of the High Court, which were heard together. In the first appeal ('main appeal'), the appellant, a financial institution and the lender, sought to set aside the decision of the High Court giving judgment for the respondent, the borrower, in its claim, principally for damages against the appellant. In the second appeal, the respondent appealed against the order of the High Court which allowed a stay of execution of the said judgment. The action instituted by the respondent against the appellant was essentially for damages for the specific sum of RM289,105,634.57, in addition to aggravated and exemplary damages, all of which were allegedly suffered by the respondent due to the appellant's inaction towards the request for redemption made by AmBank Islamic for the respondent. Numerous financing facilities had been extended to the respondent. To obtain the credit facilities from the appellant, the respondent had charged immovable assets comprising lands, commercial and residential building as well as fixed deposits to the satisfaction of the appellant. Central to this case were the third party land charge given by one Vallaipan Perumal, a land charge given by the respondent over the five landed properties ('five

lands'). The appellant had received a request from AmBank Islamic's solicitors for a redemption statement in connection with five lands. The appellant sent a letter to the respondent which allowed the redemption of the five lands but subject to certain terms and conditions which included the necessity for the respondent to gradually pay down receivable purchase facilities ('RP facilities') and for the respondent to obtain the consents of the third party security provider and the guarantor's for the release of the five lands. The appellant however did not issue any redemption statement. Subsequently, following another request for redemption statement in respect of the same five lands, this time from Bank Islam, the appellant, by its letter dated 18 July 2017, allowed the respondent to redeem the same, even without having to fully repay the facilities or even the ones secured by the five lands, subject to certain terms and conditions set out in the said letter. Evidence of the respondent's own directors showed that this was accepted by the respondent without any reservation. The appellant issued a redemption statement *cum* undertaking to Bank Islam's solicitors for the five lands for the sum of RM5 million. This was when the respondent was indebted to the appellant in the total sum of RM16,934,774.35 under the term loan 3, tradeline 1 and tradeline 2 facilities and when the respondent's total indebtedness owed to the appellant concerning all the facilities was in the aggregate of RM29,985,316.13. The land charge over the five lands was accordingly duly discharged but the respondent however defaulted in its obligations as agreed in the appellant's letter dated 18 July 2017 to pay RM3 million to settle the bills due under the tradeline facility as well as failed to make payments as contracted under the IF6 facility. The respondent filed the instant suit against the appellant. The appellant recalled the various credit facilities granted to the respondent. The High Court in its judgment, (i) ordered the appellant to pay the respondent the sum of RM289,105,634.57 as damages; (ii) agreed that the crux of the respondent's claim arose from the appellant's failure to respond to the request for a redemption statement to AmBank Islamic and the appellant breached its contractual obligations against the respondent and was negligent in not allowing the redemption and as a consequence, breached its duty of care as a banker towards its customer; (iii) held that the appellant's right to review and/or to consolidate the credit facilities pursuant to the express terms of the facilities agreement, letters of offers and security documents was subject to its obligation to honour the respondent's right to seek redemption for the five lands *albeit* upon full settlement of the facilities; (iv) further held that, as a matter of public policy, the appellant owed a duty of care towards its customer to support its business and to assist the respondent's small time customers who were relying on the respondent; and (v) found that the appellant had forced upon the respondent the arrangement for the repayment of the credit facilities, especially with regard to the RP facilities and that the alternative funding offered by AmBank Islamic in exchange for the charge of the five lands would have fully settled the respondent's loans with the appellant.

Held (allowing main appeal; striking out appeal against stay)
Per Mohd Nazlan Ghazali JCA delivering the judgment of the court:

(1) The appellant had a right under the terms of the charge document, specifically in cl. 15.07(a) therein, to refuse redemption of the charged properties unless all the facilities were repaid. By the terms of the legal charge, it had been expressly agreed that the respondent may not redeem any security, including the charge, except on payment of all monies due to the appellant as the chargee bank. Given this context, the appellant's conduct in not performing a review of the facilities granted to the respondent was not in any manner irregular or unwarranted. In any event and again, as was standard, the relevant facilities agreement and security documentation would invariably give the right to review on the lender. There was no exception here. (paras 47 & 48)

(2) There was no justifiable basis for upholding a cause of action based on the request by AmBank Islamic for the said redemption. The respondent was estopped from complaining about the redemption request for AmBank Islamic and the reduction of the RP facilities since not only had the respondent come up with its own repayment schedules in response to the appellant's proposed conditions for the proposed redemption, which then rendered the request redundant but also as the appellant had subsequently discharged the charges over the five lands without any complaint from the respondent at the material time. There was thus absolutely no truth to the contention that the appellant denied the respondent's right to redeem for such right was never in dispute. (paras 66-68)

(3) The conclusion arrived at by the High Court was not surprising considering that the JC did not address any of the evidence on not only the reasons for the review but also the discussions held between the respondent and the appellant, including even the all-important own proposals by the respondent to pay down the RP facilities, first through the three-tranche reduction and then, the second repayment schedule offer. Neither did the High Court deal with the evidence that the redemption request by AmBank Islamic became no longer relevant since the appellant had subsequently issued a redemption statement for the five lands which were redeemed by Bank Islam. (para 73)

(4) The redemption statement would only be issued on fulfilment of the conditions and that upon the issuance of the redemption statement would there be a freeze of the utilisation of the RP4 and RP5 facilities. All outstanding amounts due prior to receipt of the redemption amount should be settled as and when they become due. In the various discussions and correspondences between the parties following this, the

respondent never furnished the consent of the third party security or the guarantor's for the release of the five lands. As such, no redemption statement was forthcoming from the appellant. (para 103)

(5) In the letter dated 18 July 2017 on the IF6 facility, the appellant spelled out the terms for the redemption by Bank Islam, the key of which included: (i) RM5 million to be paid as the redemption sum for the five lands (which was lower than the market value of RM8 million); (ii) as the lands were worth at least RM8 million, the RM3 million balance was to be topped up by payment in two tranches to the appellant; and (iii) consent of the third party security parties and the guarantors ought to be furnished to the appellant for the release of the five lands. The respondent agreed to these terms. The redemption thus occurred. The charge over the five lands discharged but the RM3 million was never paid by the respondent to the appellant. There were also other unpaid facilities with the appellant. (paras 120 & 121)

(6) The appellant had shown that it had acted, throughout the relevant period, in accordance with the clear terms of the financing and security documents, that there were undeniably no variations to the terms of these documents, that Bank Negara Malaysia had even stated that the review and subsequent conduct concerning the credit facilities was a normal credit valuation and the overarching point that the respondent had in fact agreed to the gradual reduction of the RP facilities in its conduct during negotiations post the receipt by the appellant of the redemption request from AmBank Islamic. (para 127)

(7) There was no duty of care owed by the appellant to the respondent to advise the respondent of the latter's financial position. The relationship between the respondent and the appellant was entirely one between a borrower and a lender. The respondent failed to discharge the burden of showing that the appellant owed a duty of care that was beyond the normal debtor-creditor relationship to the respondent or how the appellant had breached any such duty of care. Given the finding that the respondent failed to prove its claim against the appellant, the issue of damages did not arise in the absence of liability of the appellant. The order of the High Court for damages in the sum of RM289,105,634.57 to be paid by the appellant to the respondent was without valid evidential support, was not sustainable and must be set aside. (paras 137, 150 & 170)

(8) Aggravated damages are generally awarded if there was injury to the plaintiff as an individual. A company like the respondent could only recover general damages but not aggravated damages. The order of the award for aggravated and exemplary damages against the appellant was erroneous and could not be supported. (paras 181 & 182)

(9) The main appeal was allowed and the decision of the High Court was set aside. Given the setting aside of the judgment of the High Court, the stay of the execution of the judgment now became academic. As such, the appeal against the stay was struck out. (paras 183 & 184)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(dist)***

Ang Beng Choo v. RHB Insurance Bhd [2013] 1 LNS 382 HC ***(refd)***

Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***

Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2016] 10 CLJ 247 HC ***(refd)***

Bonham Carter v. Hyde Park Hotel [1948] TLR 177 ***(refd)***

CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd [2006] 2 CLJ 409 CA ***(refd)***

Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd [2014] 6 CLJ 269 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 9 CLJ 537 FC ***(refd)***

Iftikar Ahmed Khan v. Perwira Affin Bank Bhd [2018] 1 CLJ 415 FC ***(refd)***

Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***

KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd [1996] 2 CLJ 611 CA ***(refd)***

Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Kuan Pek Seng v. Robert Doran & Ors And Other Appeals [2012] 1 LNS 775 CA ***(refd)***

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

New Zealand Shipping Co v. Societe Des Ateliers Et Chantiers De France [1919] AC 1 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd [2016] 8 CLJ 211 CA ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd & Ors [2007] 1 LNS 290 HC ***(refd)***

Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***

Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors [2018] 1 LNS 62 CA ***(refd)***

Rookes v. Barnard [1964] AC 1129 ***(refd)***

Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal [2017] 1 LNS 500 CA ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Serangoon Garden Estate Ltd v. Marian Chye [1958] 1 LNS 77 ***(refd)***

Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor [2016] 7 CLJ 823 FC ***(refd)***

Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

A **Legislation referred to:**
Companies Act 2016, s. 368
Contracts Act 1950, s. 74(2)
Evidence Act 1950, ss. 103, 114(g), 134
Financial Services Act 2013, ss. 2, 123, 124(1), 133(1), Schedule 7
National Land Code, s. 256(3)

B *For the appellant - Yoong Sin Min, Marianne Loh Suet May & Jay Koh; M/s Shook Lin & Bok*
For the respondent - Gopal Sri Ram, Austen Pereira, Latheefa Beebi Koya, Derek Fernandez & Joseph Tan Pin Ren; M/s Fernandez & Selvarajah

C *[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No. BA-22NCvC-46-01-2019 (overruled in part).]*

Reported by Lina E

JUDGMENT

D **Mohd Nazlan Ghazali JCA:**

Introduction

[1] This case involved two appeals. In the first, main appeal, the appellant (the defendant at the court below) sought to set aside the decision of the High
E Court giving judgment for the respondent/plaintiff in its claim, principally for damages against the appellant. In the second appeal, which were heard together with the first, the respondent appealed against the order of the High Court which allowed a stay of the execution of the said judgment.

F **[2]** Having heard the appeals, examined the appeal records and considered the submissions by parties, we decided to allow the main appeal and set aside the judgment of the High Court. As the judgment is set aside, the stay of execution of the said judgment is rendered academic and the second appeal is thus struck out.

G **[3]** These grounds of judgment contain the full reasons for our decision.

Key Background Facts

[4] The appellant is a financial institution, the lender in this borrower and lender relationship.

H **[5]** The respondent company – the borrower – was involved in the business of importing and supplying various types of rice and commodities such as spices and organic vegetables. Its only two directors are brothers – Puvendran Chandran ("Puven") and Kuganeswaran Chandran (PW1) ("Kugan").

I

[6] The writ action instituted by the respondent against the appellant was essentially claiming damages for the specific sum of RM289,105,634.57, in addition to aggravated and exemplary damages, all of which allegedly suffered by the respondent due to the appellant's inaction towards the request for redemption made by AmBank Islamic for the respondent.

[7] Pursuant to various and numerous letters of offer, in respect of which a great majority of these, or those which were dated between 28 August 2013 to 11 July 2017 had all been addressed to Puven – a facilities agreement dated 28 January 2014 and the receivable purchaser agreement (with recourse) (factoring agreement) dated 23 April 2015 entered into between the respondent and the appellant, numerous financing facilities were extended to the borrower.

[8] These may conveniently be referred to as the term loan (entrepreneur protection assurance), tradeline 1 comprising of, *inter alia*, banker acceptance and bank guarantee, tradeline 2, tradeline 3, term loan 1, term loan 2, receivable purchase 4 ("RP4"), term loan 3, term loan 4, receivable purchase 5 ("RP5") and invoice financing 6 ("IF6").

[9] As to be expected, in order to obtain the credit facilities from the appellant, the respondent had charged immovable assets comprising lands, commercial and residential buildings as well as fixed deposits to the satisfaction of the appellant. Central to this case were the third party land charge given by one Vallaipan Perumal, a land charge given by the respondent over the five landed properties ("the five lands"), and various letters of guarantees executed by the said two directors of the respondent.

[10] At the core of this litigation is the financing related to the RP4 and RP5 facilities. Receivables financing commonly concerns a business receiving funding based on issued invoices. Those invoices refer to purchases made by its customers, but payment has not been received yet or not become due. The business thus sells the outstanding invoices to a financial institution in return for a short-term loan that is a percentage of the invoice value. This means that receivable financing permits businesses to receive funding for their business while waiting for their invoices to get paid. This facility is a form of a line of credit which effectively converts the business' account receivables, which include outstanding invoices payable to the business, into immediate cash for the business.

[11] In this instant case, under the RP facilities, the respondent would apply to the appellant to finance invoices issued by the respondent to its customers in relation to the respondent's supply of rice and grain to its customers. Whilst the respondent would expect payment under the invoices sometime in the future, the respondent would apply to the appellant for advance financing of 80% of the invoice sums. The appellant on its part would advance such sums and expect to be paid the full invoice amounts on the respective due dates of the invoices under the RP facilities.

[12] For these RP facilities, the appellant had only permitted – in respect of RP4 – Koperasi Jaringan Bersepadu Malaysia Berhad ("KOJARIS") and Koperasi Majlis Belia Felda Malaysia Berhad ("FELDA") as the approved debtors of the respondent, and for RP5, KOJARIS alone.

[13] The other facilities that ought to be highlighted are the term loans, both granted on 30 July 2015. Term loan 3 in the sum of RM5,527,000 and term loan 4 in the sum of RM5,670,000, with an aggregate sum of RM11,197,000 were both for a tenure of ten years. It is important to note and it is not in dispute as shown in the financing documents that the purpose of term loan 3 was to finance up to 70% of the respondent's acquisition of the five lands whilst that for term loan 4 was to finance up to 70% of the estimated construction costs of a factory and warehouse on the said five lands.

[14] The appellant's position is that these buildings were expressly made known by the respondent to the appellant to be the office and factory/ warehouse and main operating premises of the respondent, for its rice and grain supply business.

[15] The respondent then purchased the said five lands following the disbursement of term loan 3 on 4 September 2015. As a result of this purchase, and as mentioned earlier, as part of the security arrangement for the various facilities extended by the appellant to the respondent, the said five lands were subsequently charged to the appellant bank as security – but crucially, and this also cannot be denied given the charge documents, only in respect of the specific financing of term loan 3, term loan 4, tradeline 1 and tradeline 2 facilities.

[16] As for term loan 4, following request by the respondent, this was cancelled on 6 April 2017 after the respondent informed the appellant that it had obtained new banking facilities from Maybank, SME Development Bank and AmBank Islamic for an aggregate amount of about RM75.2 million.

[17] The very basis of this suit by the respondent is the claim for damages for contractual breach, negligence and breach of duty of care on the part of the appellant bank for the latter's alleged failure to issue a redemption statement despite a request made on behalf of the respondent. On 5 December 2016, the appellant received a request from AmBank Islamic's solicitors, for a redemption statement in connection with the said five lands.

[18] The appellant sent a letter dated 4 January 2017 to the respondent which in fact allowed the redemption of the said five lands but subject to certain terms and conditions, which included principally first the necessity for the respondent to gradually pay down the RP facilities. And secondly, for the respondent to obtain the consents of the third party security provider and the guarantors' for the release of the said five lands. This was because these

parties' liability for the credit facilities would be affected by the discharge of the said five lands as such lands would no longer be security for the remaining tradeline 1 and tradeline 2 facilities which were then also outstanding.

[19] Much then transpired in the interaction between the parties, in meetings and as evidenced in written correspondences, following this request for redemption by AmBank Islamic, most of which are raised by the appellant in support of its case. This will be dealt with in the course of these grounds of judgment. The appellant bank however, it is not disputed, did not finally issue any redemption statement in response to such request from AmBank Islamic. It suffices to state that subsequently, following another request for redemption statement in respect of the same five lands, this time from Bank Islam, the appellant bank, by its letter dated 18 July 2017, allowed the respondent to redeem the same, even without having to fully repay the facilities or even the ones secured by the said five lands, subject to certain terms and conditions set out in the said letter. Evidence of the respondent's own directors' resolution shows that this was accepted by the respondent without any reservation.

[20] Thus on 9 August 2017, the appellant issued a redemption statement *cum* undertaking to Bank Islam's solicitors, for the said five lands for the sum of RM5 million. This was when the respondent was indebted to the appellant in the total sum of RM16,934,774.35 under the term loan 3, tradeline 1 and tradeline 2 facilities, and when the respondent's total indebtedness owed to the appellant concerning all the facilities was in the aggregate sum of RM29,985,316.13.

[21] The land charge over the five lands was accordingly duly discharged, but the respondent however subsequently defaulted in its obligations as agreed in the said appellant's letter of 18 July 2017 to pay RM3 million to settle the bills due under the tradeline 1 facility, as well as failed to make payments as contracted under the IF6 facility (which had earlier settled part of the RP4 and RP5 facilities). In fact, the respondent subsequently defaulted in all its other facilities with the appellant bank.

[22] By then though, the appellant bank was only one of ten financial institution creditors of the respondent. It is not disputed that the latter had obtained millions of ringgit in financing from these financial institutions but was unable to pay its debts. Thus in August 2018, the respondent applied to be placed under the purview of the small debt resolution scheme ("the SDRS") overseen by the Small Debt Recovery Committee Or Jawatankuasa Penyelesaian Pinjaman Kecil ("JPPK") set up under the aegis of Bank Negara Malaysia.

[23] However, on 22 March 2019, JPPK issued a letter to the respondent rejecting its application for restructuring and thus removed the respondent from JPPK's purview. But before the rejection, due to the respondent's

application to SDRS, the respondent obtained the benefit of an informal standstill of all legal actions by creditor banks as JPPK would require all such creditors to withhold further action pending JPPK's decision on the application. As such, given this informal standstill, the appellant did not recall the credit facilities granted to the respondent, notwithstanding that they have all already gone into default.

[24] Separately even whilst the respondent's SDRS application was still pending, the respondent on 17 January 2019 obtained an *ex parte* restraining order pursuant to s. 368 of the Companies Act 2016 which duly lapsed on 16 April 2019 un-extended, and with no restructuring proposal proffered by the respondent. For completeness, on 24 June 2019, the respondent managed to obtain another *ex parte* restraining order but its attempt to extend was opposed by its creditor banks and this second restraining order was set aside on 2 October 2019.

[25] Just about a week before the first restraining order lapsed, on 9 April 2019, the respondent filed the instant suit against the appellant bank. Pursuant to its re-amended statement of claim, the respondent had sought against the appellant bank, first, the sum of RM289,105,634.57 being damages together with a statutory interest of 5% per annum from the date of the writ of summons until the date of realisation; secondly, damages to be assessed (in respect of general, aggravated and exemplary damages); thirdly, in the alternative, for the appellant to permit the respondent to fully drawdown and utilise the available limits of the credit facilities including but not limited to the trade facilities as per the letter of offer dated 18 July 2017; and fourthly, costs.

[26] The appellant bank on 12 June 2019 (before the second restraining order) recalled the various credit facilities granted to the respondent, by then without any impediment in the form of any restraining order and the informal standstill imposed by JPPK.

The High Court Decision

[27] The High Court described the suit as one for a breach of contract and negligence which resulted in losses suffered by the respondent which consequently put the respondent in a position of being in alleged default of its commitments towards its financiers and customers. The High Court in its judgment found for the respondent. It primarily ordered the appellant to pay the respondent the sum of RM289,105,634.57 as damages as prayed for by the respondent, together with interest 5% per annum from the date of the writ of summons (25 January 2019) till the date of realisation; as well as both aggravated and exemplary damages to be assessed and costs.

[28] The learned Judicial Commissioner (JC) agreed that the crux of the respondent's claim arose from the appellant's failure to respond to the request for a redemption statement to AmBank Islamic. The learned JC

determined that the appellant breached its contractual obligations against the respondent and was negligent in not allowing the redemption and as a consequence, breached its duty of care as a banker towards its customer.

[29] The High Court also held that the appellant bank's right to review and/or to consolidate the credit facilities pursuant to the express terms of the facilities agreement, letters of offers and security documents was subject to its obligation to honour the respondent's right to seek redemption for the said five lands *albeit* upon full settlement of the facilities.

[30] Further it was held that as a matter of public policy, the appellant as a banker/financier, owed a duty of care towards its customer to support its business and to assist the respondent's small-time customers who are relying on the respondent. The learned JC stated that upon receiving AmBank Islamic's redemption request, the appellant's review of the terms and conditions of the credit facilities, and the variation thereof were performed for the purpose to ensure the respondent would remain as a debtor or customer of the appellant bank.

[31] Other key findings of the High Court included that the appellant had forced upon the respondent the arrangement for the repayment of the credit facilities, especially with regard to the RP facilities, and that the alternative funding offered by AmBank Islamic in exchange for the charge of the five lands would have fully settled the respondent's loans with the appellant bank. The learned JC also held that no adverse inference was to be drawn against the respondent for failing to call Puven to testify.

[32] It was thus concluded that because of the appellant's conduct, it had caused the respondent to suffer loss and damages in the sum of RM289,105,634.57, along with aggravated, exemplary damages, to be assessed.

Principles On Appellate Intervention

[33] The law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court:

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v. Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah & Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd v. Genisys Intergrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 where it was held at p. 800:

It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

[34] The Court of Appeal in *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 in the judgment of the court delivered by Harmindar Singh JCA (now FCJ) held thus:

[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:

(a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forestry, Sabah & Anor v. Mau Kam Tong & Ors And Another Appeal* [2010] 3 CLJ 377; [2010] 3 MLJ 509);

(b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Brothers Sdn Bhd v. Metro Charm Sdn Bhd* [2009] 6 CLJ 626; [2009] 6 MLJ 1);

(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin Raja Ahmad Terzali & Ors v. Sri Seltra Sdn Bhd* [2008] 2 CLJ 284; [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v. Wang Yew Logging & Plantation Sdn Bhd* [2013] 1 LNS 625; [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 1 LNS 1416; [2012] 4 MLJ 149).

[35] In a more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1 it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong.

Main Grounds Of Appeal

[36] The essence of the appellant's grievance is that the learned JC's judgment is plainly wrong. The appellant submitted that the High Court committed several errors of findings of fact and of law, failed to take into consideration relevant factors, and especially failed to judicially appreciate the clear evidence submitted, and failed to consider the appellant's defence and submissions, thereby warranting appellate intervention.

[37] We will examine the issues raised by the appellant next.

Analysis And Findings

Entire Conduct Of Parties Vis-à-vis The Redemption Request From AmBank Islamic

[38] The respondent alleged that the appellant did nothing upon receipt of the request for redemption dated 5 December 2016 from Messrs Syed Alwi & Co, solicitors for AmBank Islamic. The High Court ruled that the appellant's failure to issue the redemption statement constituted breach of contract and was negligent, among others.

[39] However as we have stated earlier, much did in fact transpire in response to this request. Evidence clearly shows that the appellant did not just sit idle. Neither did it ignore the respondent. This body of evidence is however largely not mentioned by the learned JC in her grounds of judgment. Upon receipt of the said request, the appellant engaged with the respondent and was prepared to allow the redemption of the five lands, subject to conditions.

The Reasons For The Appellant Conducting The Review Of The Facilities

[40] The background and context surrounding the request for the said redemption is not unimportant. Three aspects are worthy of analysis.

[41] First, based on the evidence of Lee Miang Hua (DW1) – the regional manager (central region 1) under the commercial banking unit of the appellant bank, it is to be noted that in a matter of days before the request came, on or about 24 November 2016, the appellant was informed in a meeting by the respondent's managing director, Puven, that the respondent was venturing into a completely new business. Basically, the respondent

company was planning to take over the business of Kedai Rakyat 1Malaysia, and to operate the shops of Koperasi Polis Diraja Malaysia Berhad. For this, additional new credit facilities were sought from the appellant.

[42] This came as a major surprise to the appellant as the respondent's business as had always been known as a rice and grain supplier. And the said five lands were intended and arranged to be the security for at least ten years, coinciding with the tenure of term loan 3. The redemption request from AmBank Islamic came only about one year after the respondent purchased the said five lands using the said term loan 3. The concerns expressed by the appellant as the lender were thus neither unreasonable let alone uncalled for.

[43] This concern was also certainly not misplaced since the appellant had assessed the creditworthiness of the respondent as a borrower *vis-à-vis* the various credit facilities extended to it on the basis of the respondent's original business, not operating a chain of retail shops. And there was certainly a cause for concern since the appellant was being asked *via* the redemption request, to release its main security on account of the repayment of term loan 3 only and the respondent was also not repaying all the other remaining facilities at the same time.

[44] After due consideration, the appellant did not accede to the respondent's request for new credit facilities. And the respondent then managed to get AmBank Islamic to request for the redemption statement from the appellant.

[45] Secondly, as mentioned, later on 6 April 2017 the respondent asked for the cancellation of term loan 4 which again surprised the appellant since the reason for term loan 4 was for the construction of the office and factory/warehouse and main operating premises of the respondent on the said five lands for the respondent's original rice and grain business.

[46] Thirdly, and especially crucially, whilst the request from AmBank Islamic was with a view to redeeming the said five lands, the respondent only intended to settle term loan 3 – yet the charge on the said five lands, as documented, secured other facilities as well. The relevant parts of the letter read as follows:

Borrower/Customer	:	Prolink Marketing Sdn Bhd
Account No:		708-413-089-7-00000 [term loan 3 account number]
Properties:		all those 5 pieces of land held under Grn 136983 Lot 18600, Grn 136984, Lot No. 18601, Grn 136985, Lot No. 18602, Grn 136986, Lot No. 18603 and Grn 136987, Lot No. 18604 all in Mukim Serendah, Daerah Ulu Selangor, Negeri Selangor

The Appellant's Contractual Right To Conduct Reviews

[47] It bears emphasis that the appellant bank had a right under the terms of the charge document dated 13 August 2015 – specifically in cl. 15.07(a) therein, to refuse redemption of the charged properties unless all the facilities were repaid. By the terms of the legal charge, it has been expressly agreed that the respondent may not redeem any security, including the charge, except on payment of all monies due to the appellant as the chargee bank. It reads:

> Consolidation
>
> Unless the Bank otherwise agrees, the Chargor(s) shall not be entitled to redeem this Charge or any other security whether given now or hereafter except on payment to the Bank of all monies payable or due from the Borrower(s) and/or Chargor(s) to the Bank (whether such liability be present, future, actual, contingent, primary, secondary, collateral, secured or unsecured …) under any other account or accounts, agreement or contract or otherwise with the Bank.

[48] Given this context, we do not think that the appellant's conduct in performing a review of the facilities granted to the respondent borrower was in any manner irregular or unwarranted. In any event, and again as is standard, the relevant facilities agreement and security documentation would invariably give the right to review on the lender. There is no exception here. This position is so well-embedded in banking practice that we need only mention that this right to review is spelt out among others in the letter of offer dated 30 July 2015 and the facilities agreement dated 28 January 2014.

[49] For example, cl. 3(3) of the facilities agreement reads as follows:

> (3) No obligation to advance
>
> … the Borrower agrees that the Facilities may be reviewed from time to time and at any time by the Bank irrespective whether or not an Event of Default has occurred. Upon such review, the Bank may impose such terms and conditions as it deems fit including without limitation, reducing the principal limits of the credit facilities, or require settlement of the Indebtedness. The Bank is under no obligation either at law or in equity to make or to continue to make available the Facilities or any part thereof to the Borrower.

[50] Similarly in cl. (m) of the RP4 letter of offer dated 8 April 2015 it is stated thus:

> Review and Termination
>
> Notwithstanding anything herein stated, the Facility may be recalled at the Bank's discretion at any time and payable on demand (without assigning any reason therefor) irrespective of whether or not any Repurchased Event has occurred and shall be reviewed annually or at such times as may be decided by the bank at its sole and absolute discretion. Upon review the Bank may impose any further conditions at the Bank's sole discretion.

[51] It goes without saying that these are contractual terms which are plainly binding on the parties given that it is so well-established that upon execution of an agreement, parties are bound by the entire document, in the absence of fraud or misrepresentation, and even regardless of whether a party has read the document or not (see *Serangoon Garden Estate Ltd v. Marian Chye* [1958] 1 LNS 77; [1959] 1 MLJ 113).

Bank Negara Malaysia's Position On The Review By The Appellant

[52] The conduct of the review by the appellant was also referred to Bank Negara Malaysia by the respondent in two letters. The first was dated 19 June 2018 and the second 15 October 2018. The Central Bank in its letter of 9 August 2019 responded by stating that the appellant's action to review the facilities granted when faced with the request by AmBank Islamic for the issuance was a normal credit evaluation. The said letter unmistakably provided as follows:

> ... kami mendapati tindakan OCBC mengkaji semula kemudahan yang diberikan sebelum mengeluarkan kenyataan penebusan adalah penilaian kredit biasa.

[53] It could not get any clearer than that. Further, despite an officer of the BNM having been issued with a subpoena by the respondent and was on the respondent's amended list of witnesses, he was never called to the stand by the respondent as a witness.

Respondent Made Proposals On RP Reductions Accepted By The Appellant

[54] Further, following the requisite review, the appellant was in fact agreeable to the redemption request, *albeit* on certain terms and conditions, as stated earlier. As also mentioned earlier, the appellant did send a letter dated 4 January 2017 to the respondent allowing the redemption subject to the terms therein with a view to gradually paying down the RP facilities. Importantly, the respondent did respond to this letter and negotiations and agreements did ensue thereafter between the parties.

[55] Evidence, including particularly in the form of the testimony by DW1 – Lee Miang Hua (DW1) – the regional manager (central region 1) under the commercial banking unit of the appellant bank, and Tong Mei Hsien (DW2) – the head of special asset management of the appellant – shows that in response to the letter from the appellant of 4 January 2017, first, Puven, the managing director of the respondent met with and informed the appellant that he did not agree to the said letter. That, significantly was not the end of the matter. He, for the respondent, instead proposed a three-tranche repayment schedule for a gradual reduction of the RP4 and RP5 facilities by three-tranches of RM10,000,000 each on every 15th of the month, commencing from March until May 2017 respectively ("the three-tranche reduction"). And the appellant accepted this as stated in its letter dated 9 March 2017 which superseded the earlier letter of 4 January 2017.

[56] The matter did not end there. Further steps were taken by the respondent. In the respondent's proposed three-tranche reduction, the first tranche of RM10,000,000 was promised to be paid by the respondent by 15 March 2017.

[57] Despite agreement on the basis of the said letter dated 9 March 2017 though, very soon after, the respondent issued its letter of 14 March 2017 with a proposal to make repayments based on another, new, second repayment schedule. This, it cannot be emphasised enough, represented an override of the respondent's own initial three-tranche repayment schedule. And yet again, the appellant agreed to accept the respondent's second repayment schedule.

[58] Nonetheless, despite the respondent coming up again with its own proposal which the appellant accepted, the respondent still failed to make payments in accordance with its own second repayment schedule. The appellant then offered a bill creation and settlement schedule on 24 May 2017. But this was not accepted by the respondent.

[59] It is important to appreciate that it has been established in evidence too that in all the said meetings and the correspondence referred to above following the earlier request for redemption from AmBank Islamic, nothing more was said by the respondent of the request for the said redemption. None was in any event to be expected given the development on the matter as stated. Neither did the respondent refute that it had proposed the two reduction schedules.

[60] Indeed the redemption request from AmBank Islamic appeared by then to have been a non-issue as the appellant too found out that the respondent had in fact been granted the relevant facilities by AmBank Islamic, even without having to redeem the said five lands.

[61] We pause to say that with this undisputed evidence of subsequent agreement between the parties, we find that any finding that liability is found against the appellant by reason of the non-issuance of the redemption statement is simply untenable. This will also mean that the premise of the respondent's claim against the appellant, as agreed by the High Court to be founded on the non-issuance by the appellant of the redemption statement requested by AmBank Islamic, cannot therefore be sustained as the same has plainly been overtaken by events involving the knowledge and participation of both parties.

Subsequent Request For Redemption From Bank Islam

[62] On 18 May 2017, the appellant received another request for a redemption statement on the same five lands, As mentioned, this time the request came from the solicitors for Bank Islam.

[63] The appellant discussed with the respondent its conditions for acceding to the request, given the said cl. 15.07(a) of the legal charge for the said five lands which as highlighted earlier, specifically stated that the appellant bank may refuse to allow redemption unless all the facilities were repaid. The respondent was at the time still unable to settle the RP4 and five facilities despite its earlier own proposed schedules.

[64] The appellant however agreed that it would convert an amount of RM9 million due and becoming due under the RP facilities into an invoice financing (IF) facility. This new facility would be granted to enable about RM9 million of the outstanding RP facilities amount to be settled. This was officially offered in its letter dated 18 July 2016, and duly accepted by the respondent.

[65] This then saw the redemption of the said five lands at only RM5 million, despite their value then of RM8 million. The balance RM3 million in the value of the said five lands which was supposed to have been paid in cash by the respondent to the appellant as part of the redemption agreement nonetheless never occurred. The respondent defaulted on the same as the respondent also defaulted in repayment of the IF facility as well as all its other facilities.

[66] In light of the aforesaid evidence, overwhelming to say the least, we find that there is no justifiable basis for upholding a cause of action based on the request by AmBank Islamic for the said redemption. It bears emphasis that the respondent was fully aware of the status of the same, which could not have been permitted merely for settlement of TL3, and it participated in discussions on the same, and even made its own proposals on reduction of facilities, which it consistently did not honour.

[67] The respondent is as such estopped from complaining about the redemption request of AmBank Islamic and the reduction of the RP facilities, since not only had the respondent come up with its own repayment schedules in response to the appellant's proposed conditions for the proposed redemption, which then rendered the request redundant, but also as the appellant had subsequently discharged the charges over the said five lands, without any complaint from the respondent at the material time.

[68] There was thus absolutely no truth to the contention that the appellant denied the respondent's right to redeem for such right was never in dispute. The actual request for redemption itself was as such not followed up with by the respondent, let alone complained about (until the initiation of the suit) and AmBank Islamic even proceeded to extend the facilities to the respondent – RM38,700,000 worth of facilities – without pursuing the redemption. On top of that the said five lands were even subsequently allowed to be redeemed in favour of Bank Islam *albeit* for RM5 million only at below market value time when the other secured facilities had yet to be

repaid, in order to assist the respondent. A finding that the appellant was negligent and was in breach of its contractual obligation is not supported by evidence and is entirely unwarranted.

[69] We emphasise that by the subsequent conduct of the parties, the legal principle of estoppel should rightfully operate to prevent and disapprove of the inequitable conduct of the respondent in denying what had transpired subsequent to the redemption request by AmBank Islamic, and in mounting such a claim against the appellant.

[70] Reference ought to be made to the decision of this court in *KGN Jaya Sdn Bhd v. Pan Reliance Sdn Bhd* [1996] 2 CLJ 611; [1996] 1 MLJ 233, which held as follows:

> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having do so, it ought not to be permitted to now contend otherwise.
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and it is now beyond question. See *Boustead Trading [1985] Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331.

[71] Additionally, given that the respondent itself had, post-the redemption request from AmBank Islamic – made proposals which were also accepted by the appellant, as well as the respondent's other conduct, its claim against the appellant which was predicated on the alleged failure of the appellant to issue the requested redemption statement to AmBank Islamic is therefore untenable for the respondent also cannot blow hot and cold. The respondent cannot approbate and reprobate.

[72] In the case of *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 10 CLJ 247, the High Court concisely stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v. Smooth Track Sdn Bhd* [2007] 6 CLJ 570, Richard Malanjum JCA (as His Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[73] In our analysis, the conclusion arrived at by the High Court was nonetheless not surprising considering that the learned JC did not address any of the evidence on not only the reasons for the review, but also the discussions held between the respondent and the appellant, including even the all-important own proposals by the respondent to pay down the RP facilities, first through the three-tranche reduction and then, the second repayment schedule offer. Neither did the High Court deal with the evidence that the redemption request by AmBank Islamic became no longer relevant since the appellant had subsequently issued a redemption statement for the said five lands which were redeemed by Bank Islam.

Bank Secrecy And Unauthorised Disclosure

[74] We further observed that the appellant could not have informed AmBank Islamic that it could not allow the redemption of only the TL3 facility when there were millions of ringgit of other facilities which were unpaid by the respondent and secured by the National Land Code charge over the five lands in light of strict banking secrecy laws.

[75] For emphasis, financial institutions such as the appellant bank are subject to a statutory duty of secrecy under s. 133(1) of the Financial Services Act 2013 which plainly prohibits such institutions or their officers from disclosing any document or information relating to the affairs or account of any customer to another person.

[76] Neither did the respondent deny that it had never instructed or authorised the appellant to disclose to AmBank Islamic information on the outstanding amount due from the respondent to the appellant under all its facilities secured by its charge. And fundamentally, any such notification to AmBank Islamic would have exposed the appellant to the risk of prosecution for the commission of an offence under s. 133 of the FSA. The relevant provisions state as follows:

> (1) No person who has access to any document or information relating to the affairs or account of any customer of a financial institution, including:
>
> (a) the financial institution; or
>
> (b) any person who is or has been a director, officer or agent of the financial institution,
>
> shall disclose to another person any document or information relating to the affairs or account of any customer of the financial institution. ...
>
> (4) Any person who contravenes subsection (1) or (3) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.

[77] This point was also not considered by the High Court.

Whether There Was Recall Or Termination Of Facilities

[78] The High Court also held that the appellant had discontinued the respondent's drawing rights, and had recalled or terminated the facilities, in particular the RP facilities, prematurely. In our assessment this finding is simply contrary to the evidence adduced at the trial. The respondent contended that the RP facilities were terminated pursuant to the appellant's letters of 4 January 2017 and 9 March 2017 merely because the limits of the RP facilities were stated therein as zero. We again examined the appeal records.

[79] For one, DW1 had clearly testified that the appellant did not recall the credit facilities but he instead explained the difference between a recall and a paying down in that a paying down requires a borrower to reduce the debt owing gradually to the lender bank by repaying until the debt is fully settled, such as the RP4 and five facilities whereby the limit would be gradually reduced and yet the respondent would still be able to utilise the same as long as usage is within the limit. A recall of the facilities on the other hand would mean that the bank would demand for repayment of all monies under the credit facilities immediately and the facility could no longer be utilised. In the instant case evidence has shown that there was no recall of the facilities where parties had negotiated the various reduction schedules. No demand was made at the material time.

[80] Secondly, Kugan himself (PW1), the key witness for the respondent in his own testimony confirmed that there was no reference to the word "recall" in the said letter of 4 January 2017. Thirdly, the statement of account for outstanding RP facilities as at 14 March 2017 reflects clearly that the RP facilities were in fact still being utilised by the respondent and were almost fully utilised by the respondent.

[81] Further, fourthly, at the time when the respondent issued its above-mentioned letters of 29 May 2017, 7 June 2017 and 19 June 2017 to the appellant bank requesting for a revision of the financing under the RP4 and RP5, these facilities had not been recalled by the appellant bank.

Assistance And Indulgence Granted By The Appellant Bank; Failure Of The Respondent To Fully Repay Nevertheless

[82] As we have discussed, the learned JC did not consider the concerns the appellant had in relation to the respondent's new business. We must highlight that the respondent moving into new business ventures cannot be denied. This was mentioned in the letter dated 14 March 2017 issued by the respondent to the appellant to inform the appellant that the respondent was involved with multiple new projects to develop retail chain outlets all over the country which resulted in the allocation of funds for the development of this retail chain outlet. Another letter, dated 5 May 2017 contained the

admission by the respondent that it was in a "tight spot financially" as the company allocated substantial amounts of its funds to the new business ventures.

[83] As mentioned earlier, DW1 gave evidence that the appellant was extremely concerned that the respondent was moving into an entirely new and different business from its original business of supplying rice/grain to the co-operative entities, for which the various facilities were in the first place extended to the respondent by the appellant.

[84] It must be pointed out that even in the said letter of the appellant dated 9 March 2017 (which superseded the earlier letter of 4 January 2017) accepting the respondent's three-tranche reduction proposal, the appellant stated that the respondent could still drawdown under the RP facilities, as long as its utilisation was within the stipulated reduced limit, given that the limit would be reduced by every tranche payment.

[85] In the letter of 14 March 2017, signed by Puven, where the respondent proposed the second repayment schedule, the respondent notified the appellant that it had allocated funds to its new ventures and collaborated with agencies such as Koperasi Diraja Malaysia Berhad, Kedai Rakyat 1Malaysia, IMCOOP and Kedah Agro Holdings. But the appellant was never involved in financing trades of the respondent with any of these entities. More significantly, the respondent also informed the appellant that it therefore needed to wait for payments from the respondent's debtors in order to enable payments be made to the appellant. Hence the new payment proposal in the second repayment schedule, as further confirmed by the respondent's letter dated 21 March 2017.

[86] With the respondent's second repayment schedule, the limits available for drawdown were gradually reduced. Still, notwithstanding the respondent's second proposal for a gradual pay-down of the RP facilities in the second repayment schedule, the respondent again could not fully honour its own repayment schedule.

[87] In the abovementioned letter from the respondent, dated 5 May 2017, the respondent stated that it had allocated substantial amounts of its funds to its new business which led it being in a "tight spot financially". As such the respondent asked for a further revision to its own second repayment schedule – specifically, for time for payment of the bills to be extended 90 days from the due dates under the RP bills.

[88] On 9 May 2017, the appellant met with both Puven and Kugan, expressing its disagreement for the extension. The respondent was unable to settle the RP bills due on 12 May 2017 in the total sum of RM2,438,480. Arising from this default, it was only on 13 May 2017, that the appellant first disallowed further utilisation in terms of no financing of new invoices for the RP facilities.

[89] On evidence, even at this juncture, there was no recall or demand made by the appellant for the immediate payment of all the facilities. In fact, as the respondent did on 22 May 2017 regularise the overdue bills under the RP facilities, the appellant allowed the respondent to further utilise the RP facilities based on the reduced limit of the same as at 23 May 2017, by which time, the respondent was already in breach of its undertaking to repay based on its own second repayment schedule. Still, on 24 May 2017, the appellant offered a bill creation and settlement schedule which the respondent declined as per its letter of 29 May 2017.

[90] The Bank Islam's request for redemption then came on or around 18 May 2017, as stated earlier. At around this time, as at 9 June 2017, there were again overdue payments under the bills financed under the RP facilities, in the sum of RM2,786,200. Regardless, the respondent was still allowing utilisation of the RP facilities and there was no recall of the facilities.

[91] Following a meeting on 21 June 2017 between the appellant and the respondent, with Puven, Kugan and their father, Mr Chandran in attendance, the appellant proposed to convert an amount of RM9,000,000 due under the RP facilities into an invoice financing facility of RM9,000,000. This new facility would allow some RM9,000,000 of the outstanding RP facilities amount to be settled, and more time was given for the RM9,000,000 to be repaid. This was formalised in its letter of offer dated 18 July 2017 on a new invoice financing 6 facility (IF6) after a review of the various financing facilities granted to the respondent.

[92] This IF6 facility was subject to monthly repayments from October 2017 to February 2018 but gave time for the respondent to settle the facility and assisted the respondent's cashflow position pending the respondent's own drawdown of various new financing obtained from other financial institutions. Nevertheless, the respondent did not manage to repay the total sums due under the IF6 facility. The respondent defaulted in the IF6 facility.

[93] As for the redemption request from Bank Islam, as stated earlier, pursuant to the appellant's letter of 18 July 2017, the appellant allowed the redemption of the said five lands, without having to fully repay the RP facilities or even the ones secured by the said five lands, *albeit* subject to certain terms at only RM5 million, with the balance RM3 million to be paid in cash by 30 March 2018 in order to settle part of the outstanding bills due under the tradeline 1 facility.

[94] Notwithstanding cl. 15.07(a) of the charge document, the redemption sum was fixed at RM5 million, which was only sufficient to pay the term loan 3 facilities but not tradeline 1 and tradeline 2 facilities as well, despite the three being secured by the charge over the five lands.

[95] In light of the above, it is difficult to agree with the finding that the conduct of the appellant caused the respondent to suffer from financial difficulties, when evidence also demonstrates that the respondent had on most occasions continually failed to fully adhere to the repayment obligation terms of the respondent's own proposed repayment schedule as duly accepted by the appellant.

The Reasons For Rejection Of Respondent By JPPK

[96] It is additionally useful to observe that the JPPK's rejection of the respondent was accompanied with a letter copied to the respondent's bank creditors, including the appellant. The reasons stated for the rejection may conveniently be set out as summarised in the following terms:

(i) that the risk of failure to repay by the respondent was high;

(ii) that the ability of the respondent to rehabilitate its business was doubtful;

(iii) that the financial management of the respondent was not satisfactory; and

(iv) there was outflow of respondent's money to subsidiary companies which was an added burden to the respondent's cash flow.

[97] We cannot agree more with the appellant that on a careful analysis, none of these reasons identified by JPPK can be attributed to the appellant.

[98] Again, we find that the High Court failed to take into consideration relevant factors, did not judicially appreciate the clear evidence submitted, and omitted to properly consider the appellant's defence and submissions.

Whether Redemption By AmBank Islamic Was To Settle All Facilities

[99] The learned JC also made an important finding that the funding offered by AmBank Islamic *via* the redemption request of the five lands would have allowed the respondent to fully settle all its facilities with the appellant. The respondent in this appeal too repeated that the request to redeem issued by the solicitors for AmBank Islamic, was intended to fully settle the respondent's facilities with the appellant.

[100] The appellant said this is not true. Based on our review of the evidence, we must agree with the appellant.

[101] It could not have been as contended by the respondent since in the first place, as stated earlier, the redemption request of 5 December 2016 was only in respect of the account of the term loan 3. The legal charge over the lands however covered at least two other facilities, tradeline 1 and tradeline 2 facilities. Secondly, and as stated earlier too, under the relevant charge document, the appellant had the right not to issue any redemption statement unless all the three facilities granted to the respondent were settled.

[102] Thirdly, it is crystal clear from the letter of offer from AmBank Islamic dated 19 October 2016 to the respondent that although the bank had offered to make available to the respondent a total of RM38.7 million worth of facilities, it was only a Murabahah Tawarruq Term Financing-i facility of RM6.3 million which had been granted to redeem the respondent's term loan three facility with the appellant. The relevant part of the letter states as follows:

> To redeem and refinance 80% or up to RM6,300,000, whichever is the lower of term loan 3 facility from OCBC Bank (Malaysia) Berhad ("OCBC") for the purchase of 5 plot of industrial lands ...

[103] From the outset it had been made clear that that the redemption statement (in response to the request from AmBank Islamic) would only be issued on fulfilment of the conditions (inclusive of the consent from third party security provider and the guarantors) and that upon the issuance of the redemption statement would there be a freeze on the utilisation of the RP4 and RP5 facilities. All outstanding amounts due prior to receipt of the redemption amount should be settled as and when they become due. In the various discussions and correspondences between the parties following this, the respondent never furnished the consent of the third party security party or the guarantors' for the release of the said five lands. As such no redemption statement was forthcoming from the appellant.

[104] In any event, as mentioned earlier, neither was there any further written request for a redemption statement by AmBank Islamic or any follow up requests. It bears repetition that *sans* redemption of the five lands, AmBank Islamic still proceeded to grant to the respondent the full RM38.7 million facilities as per its said letter of offer 19 October 2016. And we also reiterate that redemption of the five lands was later undertaken by Bank Islam.

[105] We must make three other related observations concerning the finding of the High Court that the redemption by AmBank Islamic would have settled all the facilities extended to the respondent.

[106] First, it must be stated that despite the respondent having in fact obtained facilities from AmBank Islamic, the appellant's facilities were not repaid. Secondly, despite the facilities extended by AmBank Islamic to the respondent, the latter subsequently defaulted on the same, which led to former instituting a suit against the respondent and its two director guarantors.

[107] Thirdly, as correctly highlighted by the appellant, the contention of the respondent that the redemption request of the AmBank Islamic would have fully settled all the credit facilities was in fact never pleaded by the respondent. In *Kuan Pek Seng v. Robert Doran & Ors And Other Appeals* [2012] 1 LNS 775; [2013] 2 MLJ 174, the Court of Appeal stated as follows:

> The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Thus, a party is bound by his pleadings and his case is confined to the issues raised in the pleadings unless and until they are amended. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial which evidence will be needed ... The matters in issue are determined by the state of pleadings at their close (*Halsbury's Laws of Malaysia* Vol 1 para 10.3.129).

[108] The critical importance of parties and the court to be bound by the four corners of the pleadings of the litigants has been emphasised many a times by various judicial pronouncements of high authority. We need only refer to relevant passages from only two relatively recent decisions by the apex court on this issue.

[109] In the Federal Court decision in the case of *Giga Engineering & Construction Sdn Bhd v. Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 9 CLJ 537, Richard Malanjum CJ (Sabah & Sarawak) (later Chief Justice) held thus:

> [42] Now, it is trite law that the plaintiff is bound by its own pleadings. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302 SC; *Joo Chin Kia v. Loh Seng Tek* [1987] 1 CLJ 194; [1987] CLJ (Rep) 662; *KEP Mohamed Ali v. KEP Mohamad Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10 FC). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place. (See *Esso Petroleum Co Ltd v. South Port Corp* [1956] AC 218; *Playing Cards (Malaysia) Sdn Bhd v. China Mutual Navigation Co Ltd* [1980] 1 LNS 57; [1980] 2 MLJ 182 FC).

[110] In another Federal Court decision in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944, Ramly Ali FCJ held instructively as follows:

> [29] It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see: *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ 490; and *Anuar Mat Amin v. Abdullah Mohd Zain* [1989] 1 LNS 74; [1989] 3 MLJ 313). In *Blay v. Pollard & Morris* [1930] 1 KB 628, Scrutton LJ ruled that: "Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment."
>
> [30] The Supreme Court in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428, had also emphasised the importance of pleadings and ruled that where a vital issue was not raised

in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] MLJU 56 FC).

[31] On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157, had also pointed out that "as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered" (see also: *Haji Mohamed Dom v. Sakiman* [1955] 1 LNS 26; [1956] MLJ 45; and *Kiaw Aik Hang Co Ltd v. Tan Tien Choy* [1963] 1 LNS 59; [1964] MLJ 99). ...

[33] The issue raised, if accepted, would completely change the character of the appellant's defence to the respondent's claim and would be highly prejudicial to the respondent's case.

[34] For the purpose of the present appeal, we will only consider the pleaded case of the parties before us. To borrow the words of Gopal Sri Ram JCA in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357, "... once a defendant takes that course, he must stand and fall on his pleaded case; we cannot simultaneously put forward an un-pleaded case ..."

[111] We also considered the respondent's argument which claimed that there was no objection raised by the appellant when the latter's witness, DW1 was cross-examined on the issue that the redemption request from AmBank Islamic was to fully settle the facilities owing to the appellant bank. However, as highlighted by lead counsel for the appellant at the appeal hearing, objection had in fact been raised that it was never the respondent's pleaded case, as follows:

YSM ... Just, I just want to record that I went back last night and I checked the pleadings, and the questions that were posed by my learned friends concerning the allegation that the request for the redemption was for the full outstanding. This is actually not their pleaded case. I went back and I looked at it, in fact, they had complained that there was misrepresentation that some of the facilities were part of the charge. So I wish to record that objection, that this is not their pleaded case. But I will of course reserve my opposition to this stand that they are taking when I deal with the submissions. I just wish to record that this is not their pleaded case. Thank you, My Lady.

Whether The Appellant By Its Conduct Wanted The Respondent To Remain As Borrower

[112] There is also the finding of the learned JC that upon receiving the redemption request from AmBank Islamic, the appellant had reviewed the terms and conditions of the credit facilities, with "the intention/purpose of ensuring the respondent remains as a debtor/customer of the bank".

[113] In light of the entire evidence as contained in the appeal record, we find that this determination by the High Court was arrived at without sound basis as it was premised on a bare allegation made by the respondent and plainly denied by DW1 for the appellant. It has already been discussed earlier that the reason for the review was the concerns the appellant had on the respondent's intended new business venture. And this concern did not come about without justification, and that the appellant's conduct in this regard was wholly authorised under the express terms of the financing documents, such as in cl. 2(p) of the letter of offer dated 30 July 2015 on the right to suspend any of the facilities, cl. 3(3) of the facilities agreement on the right to have the facilities reviewed from time to time and at any time, and cl. (m) of the RP4 letter of offer dated 8 April 2015 on the right to recall and for the facilities to be reviewed annually. Clause 15.07(a) of the legal charge dated 13 August 2015 has also been mentioned earlier.

[114] We also think that the finding that the appellant bank had wanted to keep the respondent as a debtor to be contrary to commercial and business logic, given the conduct of the appellant to the contrary, as evidence has shown that the parties had agreed to reduce the available limits of the RP facilities. And given the concerns about the change in the business direction of the respondent, there would be little merit in the appellant not welcoming any proposal for the settlement of the respondent's credit facilities with the appellant.

[115] Again given the evidence of what actually transpired during the period after receipt of the redemption request from AmBank Islamic as analysed above, there is no basis to the finding of the learned JC that the arrangement for repayment was forced upon the respondent who was placed in a "situation of no choice" but to make the repayments. There is no substance let alone merit in the respondent's unsubstantiated contention that the appellant had "exerted undue pressure" on the respondent to issue instructions letters or that it was the appellant bank who had drafted and asked the respondent to issue the payment proposal.

[116] It bears emphasis that the respondent came up with the three-tranche repayment schedule, then the second repayment schedule as per its letter of 14 March 2017, as also emailed by the respondent's staff, one Miss Prema, to the appellant. Both were accepted by the appellant. Evidence shows the only involvement of the appellant in the preparation of the letters from the respondent was to add two paragraphs which appeared in the respondent's subsequent letter of 21 March 2017, to indicate which account the payments should be paid to.

[117] Moreover, the appellant on 18 May 2017 received the redemption request of Bank Islam, about five months after that of AmBank Islamic. The appellant issued its letter of 6 June 2017 stating the conditions for redemption, and this letter clearly superseded its earlier letter of 9 March 2017 on the redemption by AmBank Islamic.

[118] By the date of the Bank Islam's request, the respondent was supposed to have effected a gradual repayment of the RP facilities in pursuance of its own second repayment schedule, which as stated earlier, the respondent was not able to. And this resulted in a new request on RP4 and RP5 from the respondent in its letter of 29 May 2017 which departed from the terms of the respondent's second repayment schedule. It is worthy of note that as at 9 June 2017, there were overdue payments for bills issued under the RP facilities, in the sum of RM2,786,200.

[119] On top of the overdue payments, and the fact that there would be more bills becoming due soon, the request to redeem the said five lands by Bank Islam led to a meeting between the parties on 21 June 2017. Attended by both the directors of the respondent (Puven and Kugan) and their father, Mr Chandran, it was agreed as subsequently formalised in a letter dated 18 July 2017 that the appellant would convert an amount of RM9,000,000 due and becoming due under the RP facilities into an invoice financing of RM9,000,000 (IF6 facility). As mentioned earlier, this new facility was granted to enable RM9,000,000 of the outstanding RP facilities amount to be settled and payment for the same deferred under the IF6 facility. It bears repetition that as confirmed by DW1, the IF6 facility was for all intents and purposes used to refinance part of the outstanding bills under the RP facilities. However, as mentioned earlier, the respondent subsequently defaulted under the IF6 facility too.

[120] In that same letter of 18 July 2017 on the IF6 facility, the appellant additionally spelt out the terms for the redemption by Bank Islam, the key of which included as follows:

(i) RM5 million to be paid as the redemption sum for the said five lands (which was lower than then market value of RM8 million);

(ii) as the said lands were worth at least RM8 million, the RM3 million balance was to be topped up by payment in two tranches to the appellant; and

(iii) consent of the third party security parties and the guarantors ought to be furnished to the appellant for the release of the said five lands.

[121] It is important to state that the respondents agreed to these terms. The redemption thus occurred, the charge over the five lands discharged, but as stated earlier, the RM3 million was never paid by the respondent to the appellant. This is not to mention that there were still the other unpaid facilities with the appellant, apart from IF6, the RP4 and RP5 facilities as detailed out in its letter of 19 July 2018.

Whether Appellant's Right To Review Subject To Respondent's Right To Redeem

[122] The learned JC made another important finding which also led to the success of the respondent's claim against the appellant bank. This is the determination that whilst the appellant had the right to review the credit

facilities, the exercise of such right must be subject to the respondent borrower's right to seek redemption for the said five lands, which was also held to be "*albeit* upon full settlement of the loan".

[123] First, I agree with the submission of the appellant that reliance by the High Court on the cases of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805; *Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd* [2003] 3 CLJ 791; [2003] 4 MLJ 409; and *Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd & Ors* [2007] 1 LNS 290; [2006] 5 MLJ 21 is less than accurate. For the simple reason that these cases concerned s. 256(3) of the National Land Code which provides that on an application for an order for sale, the court shall order the sale of the charged land, unless the court is satisfied there is a "cause to the contrary".

[124] In each of these cases, the courts held that there was cause to the contrary. In contrast, here, in the instant case, in this suit, there was no issue on s. 256 of the NLC at all.

[125] This is not a case concerning a clog on the equity of redemption. The respondent (and AmBank Islamic) was not prevented from redeeming the five lands. The appellant was merely exercising its contractual right to review the facilities; and in any event, the five lands were later redeemed by Bank Islam, at a loss to the appellant.

[126] Secondly, we are satisfied that none of the other cases referred to by the respondent – which are easily distinguishable – truly advance the case of the respondent in its pursuit of this claim. We need only to refer to one of such cases, which is the decision of the Federal Court in *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] 5 MLJ 1 where it was held that the bank had acted dishonestly by not informing the borrowers of the material variations that had been effected to the facilities agreement prior to execution whereby the changes differed from the draft agreement which the borrowers had earlier agreed to.

[127] At the risk of repetition, we reiterate that in the instant case, the appellant has shown that it had acted throughout the relevant period in accordance with the clear terms of the financing and security documents, that there were undeniably no variations to the terms of these documents, that Bank Negara Malaysia had even stated that the review and subsequent conduct concerning the credit facilities was a normal credit valuation, and the overarching point that the respondent had in fact agreed to the gradual reduction of the RP facilities in its conduct during negotiations post the receipt by the appellant of the redemption request from AmBank Islamic.

[128] Thirdly, reliance was also placed by the learned JC on s. 123 of the Financial Services Act 2013 ("the FSA") to hold that the appellant had been negligent in failing to provide the respondent information about the redemption of the said five lands.

[129] For clarity, s. 123 of the FSA reads as follows:

> The Bank may specify standards on business conduct to a financial service provider for the purpose of ensuring that a financial service provider is fair, responsible and professional when dealing with financial consumers.

[130] Under s. 2 of the FSA, "the bank" refers to Bank Negara Malaysia but it is wholly unclear how s. 123 assisted the case of the respondent in the absence of evidence of what these standards, as might have been issued by BNM, are and whether they were applicable to govern the conduct of the appellant, and how they were relevant to the facts of this case to begin with.

[131] Similarly, the respondent raised the argument that under s. 124(1) of the FSA, the appellant bank shall not engage in prohibited business conduct as set out in Schedule 7 of the FSA. But we are satisfied that the respondent has not established how the appellant had engaged in any prohibited business conduct as set out in Schedule 7 of the FSA.

[132] It is also in our view wrong for the High Court to have found that the appellant bank had a duty to inform AmBank Islamic of the total outstanding sum owed by the respondent to the appellant. As stated earlier, this could infringe banking secrecy laws under the FSA given the status of AmBank Islamic as a third party in the banker-customer relationship between the appellant and the respondent. Not to mention that the redemption was only towards settlement of term loan 3, not the entire facilities.

Whether The Appellant Bank Was Negligent

[133] We further disagree with the finding of the High Court that the appellant bank had been negligent for not responding to the redemption request of AmBank Islamic and as a consequence, breached its duty of care as a banker towards its customer. First, factually on evidence as discussed earlier it is plainly untrue that the appellant simply ignored the request without more. Secondly, we agree that the relationship between the parties is purely of a debtor-creditor relationship.

[134] After all, in order to succeed in a claim on negligence, as is trite, it must first be established that the appellant owed a duty of care to the respondent, which the latter did not manage to establish. The obligations of the parties are as set out in the terms of the letters of offer, the facilities agreement and the security documents.

[135] This court in *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773 has in the judgment of Mohamad Ariff Yusof JCA reiterated this position, as follows:

> [292] As for the local case authorities, and in view of the concession by the respondents, it suffices to reflect on the succinct statement of the law as analysed by Ramly Ali J (now JCA) in *Kian Lup Construction v. Hong Kong Bank Malaysia Bhd*, *supra*, where His Lordship adopts a tripartite categorisation of banker-customer relationship:

Generally, banking institution provides a number of basic financial and advisory services to customers, namely:

(1) Traditional banking facility where customers deposit the monies with the bank and the bank is liable to repay the money when demanded or instructed by the customer ...

(2) Financial and advisory services where the bank is appointed by the customer to be the customer's adviser on matters relating to financial and advisory services. Usually these services are in addition to the first additional services stated above.

(3) Financial facility where the bank provides loan or other financial facilities to customers such as overdraft facilities. In this category, the bank is a Lender and the customer is a Borrower. As for the third instance, *ie*, where the bank provides a loan or financial facility to the customer, the relationship is also one of the Debtor and Creditor. In this case, the bank is a Creditor (Lender) and the customer is a Debtor (Borrower). From the above 3 scenarios, only the second instance involves a fiduciary relationship between the bank and the customer, while in the first and third instances, the relationship between them is merely contractual, *ie*, only as debtor and creditor, not fiduciary.

[136] Also, Azahar Mohamed FCJ (later CJM) in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441 stated as follows on the requisite test to prove the concept of duty of care:

[92] For the establishment of a duty of care in tort, the preferred test in Malaysia is the three-fold test of foreseeability, proximity and policy considerations (see *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd & Another Appeal* [2018] 6 CLJ 683). We note that the Court of Appeal in the present case did not examine this point. In *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor* (*supra*), this court set out the approach for imposing a duty of care as follows:

> [44] To put it in a nutshell the preferred test is the three-fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three fold test has been recognised by the House of Lords in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp. 617-618, His Lordship said that:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

[137] There was no duty of care owed by the appellant to the respondent to advise the respondent of the latter's financial position despite the finding of the learned JC which we find erroneous given that the relationship between the respondent and the appellant bank was entirely one between a borrower and a lender. The respondent has, in our view, patently failed to discharge the burden of showing that the appellant bank owed a duty of care that was beyond the normal debtor-creditor relationship to the respondent or how the appellant had breached any such duty of care.

[138] In our analysis, we especially observed that significant items of evidence were not adequately considered by the High Court, if at all, based on the grounds of judgment of the learned JC. Apart from what have been mentioned earlier, we reiterate that there is no true allusion to the fact concerning the reasons for the review, the RP facilities reduction proposals by the respondent, that AmBank Islamic had proceeded to grant the respondent the full RM38.7 million as offered despite not pursuing the redemption of the five lands, and with no repayments made to the appellant regardless, and that in any event, to further underscore the inconsequential nature of the redemption request of AmBank Islamic to the respondent's suit against the appellant, the said five lands were subsequently redeemed by Bank Islam instead.

[139] None of these were meaningfully analysed by the learned JC in her grounds of judgment. We cannot emphasise enough that this clearly discloses a lack of judicial appreciation of the evidence in this case.

[140] At the same time it is difficult to see how the respondent was prejudiced by all these when evidence shows the appellant had following the request for redemption from AmBank Islamic, acted in accordance with the financing and security documents, negotiated with, assisted and granted indulgence to the respondent in revising the relevant facilities which eventually the respondent still failed to repay the appellant anyways.

[141] Given the above analysis and findings, we are in agreement in holding that the respondent as the plaintiff fell very short of establishing its claim against the appellant which ought to have been dismissed by the trial court. The decision of the High Court giving judgment for the respondent must therefore be set aside.

Adverse Inference On Non-calling Of Puven

[142] One other principal complaint of the appellant is that the High Court had erred in fact and in law for failing to draw adverse inference against the respondent in its failure to produce its managing director, Puven, as a witness. Instead, it was ruled that since the calling of witnesses is the prerogative of the respective litigants, the non-calling by the respondent did not jeopardise the appellant's position.

[143] It is of course trite under s. 134 of the Evidence Act 1950 that no particular number of witnesses shall in any case be required for the proof of any fact. But the burden is on the plaintiff who institutes a civil suit to establish its case on a balance of probabilities by adducing sufficient evidence for that purpose. Having reviewed the evidence, we are of the view that this finding on no adverse inference cannot be sustained. We say so for a number of reasons. First, according to DW1, prior to March 2017, the directors who represented the respondent in various meetings was only Puven, after which Kugan started attending. To the same effect, prior 14 March 2017, letters were all signed by Puven. Secondly, prior to that, it was also Puven and him alone who attended the meeting with the appellant on or about 24 November 2016, whereat he informed that the respondent was venturing into the new business activity and had requested for new credit facilities from the appellant.

[144] Thirdly, as highlighted a number of times earlier, in that crucial meeting where the respondent proposed the three-tranche reduction, as recorded in the letter of the appellant dated 9 March 2017, it was Puven alone who attended for the respondent. It was subsequently also Puven who then proposed the respondent's second repayment schedule and signed the respondent's letter of 14 March 2017.

[145] Fourthly, Kugan (PW1), the respondent's other director who had appeared as the sole witness for the respondent at trial, testified in no uncertain terms that he was not present and was not aware or had any knowledge of what had transpired during the meetings with the appellant on 24 November 2016 and the subsequent meeting after the appellant's letter of 4 January 2017 was issued to the respondent. Fifthly, despite naming him as a witness in the respondent's amended list of witnesses, Puven was not called by the respondent to testify. Despite not having any personal knowledge of the matters dealt with by Puven, Kugan insisted that the evidence of Puven was not required. There were also no other witnesses called by the respondent.

[146] Yet, despite the undisputed and significant involvement of Puven on behalf of the respondent during that period immediately after the receipt by the appellant of the redemption request from AmBank Islamic, which if he was called, could probably have among others, bolstered the argument that the respondent had consented to such gradual reduction in the RP facilities, the respondent chose not to call Puven which resulted in the appellant instead making the effort to have him testified as a subpoena witness. This did not materialise since, as averred by the appellant's solicitors' process server, all three attempts to effect service of the subpoena on Puven were unsuccessful despite the testimony of Kugan that they shared the same home address in Section 11 Shah Alam. Instead, the process server averred that an occupant of the house at the address denied knowing Puven.

[147] We are, on this issue, as such in agreement that the decision of the Federal Court in *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823; [2016] 5 MLJ 1 which relevant parts of the judgment read as follows, are especially relevant:

> [43] The law on this issue is clear and well settled. In *Takako Sakao (f) v. Ng Pek Yuen (f) & Anor (No 2)* [2010] 1 CLJ 381; [2010] 2 MLJ 181 the Federal Court held as follows:
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> > *Two consequences followed* when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. *Firstly, the evidence given by the appellant ought to have been presumed to be true*. The judge was under a duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. His failure to direct himself in this fashion thereby occasioned a serious miscarriage of justice. *Secondly, the court ought to have drawn an adverse inference against the first respondent* on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. *The trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point amounted to a misdirection which occasioned a miscarriage of justice*. (emphasis added)

[148] In an earlier decision which affirms the proposition that the failure to call an important witness warrants an adverse inference, the Court of Appeal in *CGU Insurance Bhd v. Asean Security Paper Mills Sdn Bhd* [2006] 2 CLJ 409; [2006] 3 MLJ 1 stated thus:

> [103] ... Here is a man who is repeatedly mentioned by more than one witness relating the part he played. The respondent's failure to call him although he was present in court (as may be seen from the notes of evidence) in the circumstances of this case warrants the drawing of an adverse inference under s. 114(g) of the Evidence Act 1950. It has been held by the Judicial Committee of the Privy Council in *Seth Maganmal v. Darbarilal* AIR 1928 PC 39 that an adverse inference may be legitimately drawn against a party who fails:
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> > to call as his witness the principal person involved in the transaction, who was in a position to give a first-hand account of the matters in controversy and throw light on them, and who could have refuted on oath the allegations of the other side ...

[149] As it is not disputed and it is patently obvious that Puven was the key and for all intents and purposes also the only person representing the respondent who dealt with the appellant during that earlier material period, the failure of the respondent, as the plaintiff who bears the burden of proving

its claim on a balance of probabilities to call Puven to give evidence at trial strongly suggests that the respondent did not want him to be subjected to cross-examination. In our view, following the above two authorities, this ought to have justified the High Court to first accept the evidence given by the appellant concerning Puven as true and secondly draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the respondent. The learned JC however did neither, which according to the Federal Court in *Silver Corridor* tantamount to a non-direction occasioning a miscarriage of justice.

Whether Respondent Established Case For Order Of Damages

[150] Given our finding that the respondent failed to prove its claim against the appellant, the issue of damages does not arise in the absence of liability of the appellant. Nevertheless we shall for completeness, *albeit* in summary fashion deal with the issue of the order for the award of damages in the sum of RM289,105,634.57 as well as for exemplary and aggravated damages against the appellant.

[151] The appellant submitted that the respondent failed to prove losses or how, if true such losses were attributable to the appellant, and that were not too remote. Especially on this latter requirement, it should be stated that a key governing principle in this context is s. 74 of the Contracts Act 1950 which reads:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach

[152] No less importantly, it is settled law that in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This is also in accord with the requirement of s. 103 of the Evidence Act 1950 and the principle that he who alleges must prove (see also the Court of Appeal decision in *Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1).

[153] The respondent here, as plaintiff must therefore adduce at least sufficient evidence to enable the court to make a fair and reasonable assumption of loss. The often-quoted *dictum* of Lord Goddard CJ in *Bonham Carter v. Hyde Park Hotel* [1948] TLR 177 would be most apt in the context, and it is worth reiterating what had been said, as follows:

> Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you give me these damages'. They have to prove it.

[154] We are also guided by the Federal Court case of *Datuk Mohd Ali Hj Abdul Majid & Anor v. Public Bank Bhd* [2014] 6 CLJ 269 where it was held by His Lordship Arifin Zakaria CJ as follows:

> [32] It is trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages, before he can recover the sum claimed. This follows from the general rule that the burden of proving a fact is upon him who alleges it and not upon him who denies it, so that where a particular allegation forms an essential part of a person's case, the proof of such allegation falls on him. (See s. 103 of the Evidence Act 1950). If he fails to prove both the liability and the quantum of damages, he loses the action.
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> [33] Therefore, in a claim for damages, it is not sufficient for the plaintiff to merely state the amount of damages that he is claiming, he must prove the damage that he had in fact suffered to the satisfaction of the court. This principle is borne out in the case of *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 where Lord Goddard CJ observed:
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> ...
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> This statement was cited with approval by Edgar Joseph JR FCJ in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777.
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> [34] The claim by the plaintiff in the present case is for general and special damages arising out of breach of contract and/or negligence. Therefore, the burden rests on the plaintiff to prove the damages and it is not sufficient for the plaintiff to merely assert that he had suffered such damages without proving it. (See *The Susquehanna* [1926] AC 655 and *Bolag v. Hutchison* [1905] AC 515). In the circumstances, we hold that the learned High Court Judge was right in ordering that summary judgment be entered on liability with damages to be assessed. (See *Dummer v. Brown and Another* [1953] 1 QB 710; *Tan Ah Chim & Sons Sdn Bhd lwn. Lim Kean Siew Dan Lain-Lain* [2000] 1 LNS 206; [2000] 6 MLJ 670).

[155] This court in *Perbadanan Kemajuan Negeri Selangor v. Selangor Country Club Sdn Bhd* [2016] 8 CLJ 211; [2017] 2 MLJ 819 again summarised this position where it held as follows:

> [51] As to damages, it is settled law that in order for SCCSB to succeed in its claim SCCSB must show that the loss and damages is due to the breach of contract by PKNS. Once that is established, SCCSB has the additional burden of proving the damages. The law on the recovery of damages has been succinctly enunciated by Ramly Ali J (now FCJ) in *PB Malaysia Sdn Bhd v. Samudra (M) Sdn Bhd* [2009] 7 MLJ 681 at p 697.

It may be summarised into two main principles:

(a) the burden of proof is on the party seeking the claim to prove the facts and the amount of damages (*Hock Huat Iron Foundry (suing as a firm) v. Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65 (CA); *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 64 TLR 177; *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 2 MLJ 229 (CA)); and

(b) the damages must be proved with real or factual evidence. Mere particulars, summaries, estimations or general conclusions will not suffice (*Lee Sau Kong v. Leow Cheng Chiang* [1961] 1 MLJ 17 (CA)).

[156] Even more recently, the Federal Court in *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206; [2021] 6 MLJ 619 held that:

> [66] It is trite law that the party claiming damages, special or general, bears the burden of proving the fact and quantum of damages suffered. Edgar Joseph Jr J, writing on behalf of the Federal Court, in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 explained that in the assessment of damages for the breach of contract, the main objective is to place a party who has sustained a loss as a result of breach in the same situation as if the contract has been performed. In other words, the award for damages is compensatory in nature, and as such, the burden of proving damages or loss lies with the plaintiff.

[157] We cannot but agree with the appellant, having evaluated the totality of the evidence in this appeal. The High Court fell into error when it accepted the amount of loss allegedly suffered by the respondent which the learned JC said had been "averred" when no such evidence was produced to substantiate such claim. And not only that, for, even if there were such losses (which we find unproven) such losses or damages were clearly too remote to have been caused by the appellant.

[158] We must emphasise that s. 74(2) of the Contracts Act 1950, as set out earlier, clearly provides that such compensation is not to be given for any remote or indirect loss or damage suffered on account of the breach.

[159] There is no evidential support for the finding of the High Court that the alleged damages and losses suffered by the respondent could have been avoided if the appellant had responded to the redemption request of AmBank Islamic. It has in any event been shown that this redemption request was irrelevant to the true claim of the respondent in the first place, and no liability could attach to the appellant as a consequence. The point however is we find no evidence as to how such alleged failure to issue a redemption statement to AmBank Islamic had resulted in the respondent suffering any purported loss or damage.

[160] In addition, despite the respondent alleging that its business had been adversely affected due to the inappropriate conduct of the appellant which had then caused the respondent to exhaust all its internal funds and as a consequence, in turn, the respondent became unable to fulfil its contracts with Koperasi Jaringan Sepadu Malaysia Berhad and Kedah Agro Holdings Berhad, we however are of the view that the losses of contracts cannot be attributable to the appellant.

[161] It is incontrovertible that the appellant was never involved in financing the respondent's trade transactions with Kedah Agro Holdings, as the two approved entities for financing under the RP4 and RP5 facilities, as mentioned earlier, were Koperasi Jaringan Bersepadu Malaysia Berhad and Koperasi Majlis Belia Felda Malaysia Berhad. How then could the appellant be responsible if it was not involved in the first place. Further reliance in this respect by the High Court on photocopies of old contracts and invoices – all marked as "C" documents – involving one Kedah Agro Holdings Berhad without the original and the makers being made available at trial and without any express ruling by the court on their admissibility is far from satisfactory.

[162] Further, the allegation that the appellant had caused the respondent to experience financial difficulties which resulted in respondent failing to meet its obligation to supply rice to Koperasi Jaringan Sepadu Malaysia Berhad is a bare assertion bereft of evidence, as is the absence of evidence on how such alleged losses were attributable to the appellant.

[163] In respect of the respondent's contention that its audited financial statements for financial year ended 2017 (a Part B document, produced by the respondent at trial) referred to unrecoverable receivables of RM55,158,600, the allegation was that this was somehow attributed to the appellant's conduct. This was the key basis for the respondent's claim for the RM289,105,634.57.

[164] However, the amount stated in the statements under the item on "provision for doubtful debts" recorded a different figure of RM55,845,600. More significantly there is no information or evidence as to the identities of the debtors for these receivables and the reasons why they were not recovered. Thus, again, it certainly cannot be said that the debts were caused by the action of the appellant.

[165] There was also the problem with regard to the respondent's claims for "finance costs", "loss of profits from failure to supply under contracts to supply rice" for 2017 and 2018 and the "estimated loss" over 2019, 2020 and 2021. For the reason that these items of losses were not even pleaded in the re-amended statement of claim of the respondent.

[166] We hardly need to say more on this other than repeat that it is trite law that parties are bound by their pleadings and cannot adduce facts and issues which are not pleaded (see also the Federal Court decision in *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415; [2018] 2 MLJ 292). The pleading issue has also been dealt with earlier.

[167] There was then this allegation that the alleged breach by the appellant (which we find there was no breach) worsened the working capital deficiency of the respondent company. The learned JC in fact held that the appellant's breach precipitated the working capital deficiency of the respondent company even further and respondent was forced to reduce the sales volume and faced with financial difficulties. Hence, the losses suffered by the respondent was not due to mismanagement of its own financial affairs by venturing into new businesses as alleged by the appellant.

[168] We nonetheless find that based on evidence of the respondent's own audited accounts for financial years 2016 to 2018, the respondent's financial position should not have been impacted by the review exercise of the RP facilities. First, its total borrowings increased from RM50 million as at the financial year ended 31 March 2016 to RM128.9 million as of September 2018.

[169] Secondly, as testified by DW2 who made a comparison between the total borrowings and the working capital requirement of the respondent from the year 2016 to 2018, whilst the respondent registered a higher sum of working capital of about RM33 million in 2016, in contrast, the respondent recorded borrowings in excess of working capital in the amount of RM63 million in year 2017 and of RM127 million in 2018. Given this evaluation, at least on the basis of this comparison, where the respondent's bank borrowings were in excess of its own working capital requirements, it is difficult to accept the contention that it was the appellant which had caused financial hardship suffered by the respondent.

[170] We therefore conclude that the order of the High Court for damages in the sum of RM289,105,634.57 to be paid by the appellant to the respondent is without valid evidential support and is not sustainable. It must be set aside.

Relevance Of The Respondent's Own Conduct To Its Financial Problems

[171] We need to stress that from the grounds of judgment of the learned JC little mention if at all is made of the evidence as highlighted by the appellant which tended to show that it was the respondent's own conduct and inability to manage its finances and affairs that led to its financial problems.

[172] This is in fact supported by the respondent's own documents. First, in its restructuring proposal to the creditors *via* small debt restructuring scheme (SDRS) dated 17 January 2019 it was stated that its unfavourable cashflow

resulted from the reduction in sales, volume and profit margins as well as the necessity to service additional loans. This was further made worse by poor collection and recovery of its own trading debts, considering that many of the respondent's debtors, according to the respondent, were unable or unwilling to pay the respondent.

[173] It should also be added that based on this restructuring proposal, the respondent owed its other financiers in the total outstanding sum of more than RM129 million pursuant to the various facilities granted by them. This is also stated in a number of writs and statements of claim filed by the various other financiers against the respondent. This restructuring proposal was not accepted by its creditors. There is moreover also a lack of evidence concerning that total outstanding amount of about RM129 million, which was said to be due by the respondent to its lenders and for which the appellant was held liable by the High Court (for the financial losses and difficulties suffered by the respondent). This is in the sense that there is absolutely no information on what these loans were, and when the respondent committed the defaults and the reasons for the defaults. We construe this as especially telling as most of these were actually granted subsequent to the redemption request by AmBank Islamic, which shows that the respondent did not really have difficulty securing financing then. As highlighted by the appellant, these claims, though pleaded, were not even mentioned in the witness statement of PW1, the sole witness for the respondent as the plaintiff.

[174] Secondly, as stated earlier, as mentioned in the respondent's own letter of 5 May 2017 it had allocated substantial funds to its new business ventures. The respondent wrote to the appellant on this issue as follows:

> We have allocated substantial amount of our funds to our ongoing retail shops development projects in collaboration with government agencies. This has resulted in us **being in tight spot financially**. (emphasis added)

[175] Thirdly, also as mentioned earlier, despite the respondent's application dated around 28 August 2018, to be placed under the purview of the SDRS (overseen by JPPK), JPPK in its letter of 22 March 2019 stated its rejection of the request, for the reasons set out earlier, including, for emphasis, that the risk of failure to repay by the respondent was high; that its ability to rehabilitate its business was doubtful; that its financial management was not satisfactory; and that as confirmed also by PW1, there was outflow of respondent's funds to subsidiary companies which represented an added strain to its cash flow.

[176] Fourthly, even the respondent's annual report and financial statements for the year ended 31 December 2017 was subject to a disclaimer of opinion by its own auditor, Messrs Selva & Associates, by reason of their inability to obtain most of the information and explanations the auditors considered necessary. The financial statements thus included significant amounts based on estimates.

[177] Given the above, on the conduct of and situation faced by the respondent, we are in agreement that there was no evidential basis for the appellant bank instead to be held liable for the purported loss or damages as claimed by the respondent.

[178] A contrary finding would be akin to permitting a party in breach to benefit from its own default. It is an established presumption in law that parties to a contract do not intend that either party should be able rely on its own breach of obligations to avoid a contract or obtain any benefit under it, unless the contrary is clearly provided for by the contract (see the House of Lords decision in *New Zealand Shipping Co v. Societe Des Ateliers Et Chantiers De France* [1919] AC 1).

Whether Award Of Aggravated & Exemplary Damages Justified

[179] The appellant further argued against the award of aggravated or exemplary damages which was allowed by the High Court, to be assessed. The reasons for the award are not apparent from the grounds of judgment. We agree instead that there are a number of issues with this award. Quite apart from the failure of the respondent to first prove it had suffered losses to be entitled to compensatory damages, it has also, as discussed, not shown how the respondent suffered any losses as well as how such loss or damage was even attributable to the appellant.

[180] The weight of authorities is against the granting of an award for exemplary damages in a contractual claim (see the High Court decision in *Ang Beng Choo v. RHB Insurance Bhd* [2013] 1 LNS 382). Neither did the respondent in any event establish its case to be deserving of exemplary damages within the categories stated in the House of Lords decision in *Rookes v. Barnard* [1964] AC 1129).

[181] Aggravated damages are generally awarded if there was injury to the plaintiff as an individual. A company like the respondent can only recover general damages but not aggravated damages (see the Court of Appeal decisions in *Sambaga Valli KR Ponnusamy v. Datuk Bandar Kuala Lumpur & Ors And Another Appeal* [2017] 1 LNS 500; [2018] 1 MLJ 784 and *Raub Australian Gold Mining Sdn Bhd v. Mkini Dotcom Sdn Bhd & Ors* [2018] 1 LNS 62; [2018] 4 MLJ 209).

[182] The order for the award for aggravated and exemplary damages against the appellant in this case, is in our view erroneous and cannot be supported.

Conclusion

[183] In view of the foregoing analysis and reasons, we are unanimous in holding that the finding by the High Court that liability was established against the appellant bank to be erroneous, principally on account of among others, the clear lack of judicial appreciation of the evidence, rendering the judgment for the respondent to be plainly wrong. Appellate intervention is warranted, the main appeal is allowed, and the decision of the High Court is accordingly set aside.

[184] Given the setting aside of the judgment of the High Court, the stay of the execution of the said judgment now becomes academic. As such we strike out the appeal against the stay.

[185] We also order costs of RM80,000 (here and below) for the appellant, subject to allocator.